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No. 04-820

In the Supreme Court of the United States

CLIFFORD ACREE, ET AL., PETITIONERS

v.

REPUBLIC OF IRAQ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court was deprived of subject-matter jurisdiction over this suit two months prior to the entry of judgment when the President, in exercise of authority granted him in Section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11, 117 Stat. 579, determined that the statutory provision that serves as the sole basis for the court's subject-matter jurisdiction, 28 U.S.C. 1605(a)(7), should be made inapplicable to Iraq in light of the fundamental transformation in the United States' relations with that country after the removal of the Hussein regime by military force.

2. Whether the court of appeals correctly determined that neither "generic common law" nor the Flatow Act, which creates a cause of action against foreign governmental officials, provides a basis for asserting liability against a foreign state in a suit brought under the Foreign Sovereign Immunities Act.

3. Whether the court of appeals erred in declining to remand the case to the district court to allow petitioners a further opportunity to specify a provision of state or foreign law as the source of their common law claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 370 F.3d 41. The opinions of the district court (Pet. App. 51a-63a, 64a-162a) are reported at 276 F. Supp. 2d 95 and 271 F. Supp. 2d 179.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2004. A petition for rehearing was denied on August 19, 2004 (Pet. App. 164a-165a). On November 4, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 17, 2004, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, establishes a general rule that

"a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," 28 U.S.C. 1604, subject only to exceptions specifically enumerated in 28 U.S.C. 1605 (2000 & Supp. I 2001) and 28 U.S.C. 1607. The FSIA gives the federal district courts jurisdiction over a civil action against a foreign state if, but only if, one of those immunity exceptions is applicable. 28 U.S.C. 1330(a). The FSIA prohibits the entry of a default judgment against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. 1608(e). Thus, the FSIA imposes on the court an independent "obligation to satisfy itself that plaintiffs have established a right to relief." *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 232 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 2836 (2004).

In 1996, Congress amended the FSIA to restrict the sovereign immunity of any foreign country "designated as a state sponsor of terrorism" under the Export Administration Act of 1979, 50 U.S.C. App. 2401 *et seq.*, or the Foreign Assistance Act of 1961, 22 U.S.C. 2151 *et seq.* See 28 U.S.C. 1605(a)(7)(A).[1] As relevant here, Section 1605(a)(7) abrogates the sovereign immunity of a designated foreign state in cases involving claims for money damages for personal injury or death caused by "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources * * * for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." *Ibid.* Several months after adopting the immunity exception for acts of state-sponsored terrorism, Congress enacted a provision

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[1] All references to 28 U.S.C. 1605(a)(7) and (a)(7)(A) are to the 2001 Supplement to the United States Code.

entitled Civil Liability for Acts of State Sponsored Terrorism. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, Tit. I, § 101(c) [Tit. V, § 589], 110 Stat. 3009-172 (28 U.S.C. 1605 note). That provision, sometimes referred to as the "Flatow Act,"[2] provides in relevant part that "an official, employee, or agent of a foreign state designated as a state sponsor of terrorism * * * while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [28 U.S.C. 1605(a)(7)] for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7)."

2. On September 13, 1990, the Secretary of State designated Iraq as a state sponsor of terrorism under the Export Administration Act. 55 Fed. Reg. 37,793. As a result, Iraq under Saddam Hussein's regime was subjected to a wide range of legal and economic sanctions, including denial of visas to Iraqi nationals (8 U.S.C. 1735 (Supp. II 2002)), loss of Department of Defense assistance (10 U.S.C. 2249a(a)), loss of military contracts (10 U.S.C. 2327(b)), loss of grants and fellowships to Iraqi nationals (15 U.S.C. 7410(b) (2000 & Supp. II 2002)), denial of tariff preferences (19 U.S.C. 2462(b)(2)(F)), loss of foreign aid (22 U.S.C. 2371(a)), loss of foreign tax credits (26 U.S.C. 901(j)(2)(A)(iv)), and restrictions on United States exports (50 U.S.C. App. 2405(j)). After enactment of the FSIA's terrorism exception in 1996, the

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[2] Petitioners (and many courts) refer to the Flatow Act as the Flatow "Amendment," which may create the incorrect impression that Congress enacted the provision as an amendment to the FSIA. The Act does not, however, amend any law. See 110 Stat. 3009-172.

1990 designation of Iraq as a state sponsor of terrorism also had the effect of abrogating Iraq's immunity from claims within the scope of Section 1605(a)(7). See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(c), 110 Stat. 1243 (Section 1605(a)(7) applies to "any cause of action arising before, on, or after the date of the enactment of this Act").

3. On March 19, 2003, a United States-led coalition began military operations to disarm Iraq and remove Hussein's regime from power. The coalition has achieved that objective: Baghdad was liberated on April 9, 2003; major combat operations against the Iraqi army ended on May 1, 2003; and Hussein himself was captured on December 13, 2003.

In response to the dramatically changed circumstances in Iraq resulting from the removal of the Hussein regime, Congress and the President took various steps to stabilize Iraq and reconstruct it as quickly as possible. On April 16, 2003, Congress enacted the Emergency Wartime Supplemental Appropriations Act of 2003 (EWSAA), Pub. L. No. 108-11, 117 Stat. 559. Section 1503 of EWSAA authorized the President, *inter alia*, to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 * * * or any other provision of law that applies to countries that have supported terrorism." 117 Stat. 579. On May 7, 2003, the President exercised the full extent of that authority by issuing Presidential Determination 2003-23, which "ma[d]e inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 and any other provision of law that applies to countries that have supported terrorism." 68 Fed. Reg. 26,459 (citation omitted).

In a formal message to Congress, the President specified that the provisions of law that had been made inapplicable to Iraq by Section 1503 and Presidential Determination 2003-23 "include, but are not limited to, 28 U.S.C. 1605(a)(7), 28

U.S.C. 1610, and section 201 of the Terrorism Risk Insurance Act [of 2002]" (TRIA), Pub. L. No. 107-297, 116 Stat. 2337, relating to the enforcement of terrorism-related judgments. *Message to the Congress Reporting the Declaration of a National Emergency with Respect to the Development Fund for Iraq*, 39 Weekly Comp. Pres. Doc. 21, at 647-648 (May 22, 2003). The President's message, which also informed Congress that he had issued Executive Order 13,303 to protect Iraqi assets from "attachment or other judicial process," stated that "[a] major national security and foreign policy goal of the United States" in the wake of the successful military campaign was "to ensure that * * * Iraqi resources * * * are dedicated for the well-being of the Iraqi people, for the orderly reconstruction and repair of Iraq's infrastructure * * * and for other purposes benefiting the people of Iraq." *Id.* at 647; 68 Fed. Reg. 31,931-31,932 (2003).[3] The President stated that the "threat of attachment or other judicial process" against these Iraqi assets, and concomitant threat to the reconstruction of Iraq, constituted an "extraordinary threat * * * to the national security and foreign policy of the United States." 39 Weekly Comp. Pres. Doc. 21, *supra*, at 647.

On October 20, 2004, the Secretary of State rescinded the 1990 designation of Iraq as a state sponsor of terrorism. 69 Fed. Reg. 61,702. The Secretary explained that the rescission was "of symbolic importance" for strengthening "the partnership of the Untied States and Iraq" even though "nearly all the restrictions applicable to countries that have supported terrorism, including the application of 2[8] U.S.C. 1605(a)(7), were made inapplicable with respect to Iraq permanently in Presidential Directive No. 2003-23." *Ibid.*

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[3] Executive Order No. 13,303, 3 C.F.R. 227 (2004), was issued pursuant to the President's authority under the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* See 68 Fed. Reg. at 31,931.

4. Petitioners are 17 present and former American service members who were captured and held by the Hussein regime as prisoners of war (POWs) during the 1991 Gulf War, eight of their spouses, and 29 of their children, parents, and siblings. In April 2002, petitioners filed this suit against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his official capacity, for injuries to the POWs and their families that resulted from mistreatment of the POWs by Iraq. Petitioners invoked the district court's jurisdiction under 28 U.S.C. 1330 and 1605(a)(7). Their complaint asserted causes of action under Section 1605(a)(7) and the "traditional torts of assault, battery and intentional infliction of emotional distress." C.A. App. 143. In subsequent district court filings, petitioners identified two other asserted causes of action, one arising directly under the Flatow Act, Pet. App. 184a, and the other arising indirectly under the Flatow Act through application of the principle of respondeat superior, *id.* at 192a.

On July 7, 2003, two months after Presidential Determination 2003-23 had rendered Section 1605(a)(7) inapplicable to Iraq, the district court entered a default judgment in favor of petitioners. Pet. App. 64a. Without discussing the Presidential Determination, the district court concluded that it had subject-matter jurisdiction under Section 1605(a)(7). *Id.* at 135a-138a. On the merits, the court held that Iraq was liable to petitioners because "*Section 1605(a)(7)*, as amended [*sic*], creates a federal cause of action against officials, employees and agents of a foreign state, as well as the state and its agencies and instrumentalities themselves." *Id.* at 138a. The court further held that suits brought under Section 1605(a)(7) may be based on "conventional common law torts such as assault, battery, and intentional infliction of emotional distress," *ibid.*, and that petitioners had established "the traditional torts of assault, battery and intentional infliction of

emotional distress," *id.* at 139a, as those torts are defined in the Restatement (Second) of Torts §§ 13, 21(1), 46 (1965). Pet. App. 139a-142a. The court awarded between $19 million and $35 million to each former POW, $10 million to each spouse, $5 million to each child, parent, or sibling, and $306 million in punitive damages. *Id.* at 160a-162a. The total judgment exceeded $959 million. *Ibid.*

Promptly thereafter, within the time for filing a motion to reconsider under Federal Rule of Civil Procedure 59(e), the United States moved to intervene in order to contest the subject-matter jurisdiction of the district court and thereby ensure the effectiveness of the President's determination under Section 1503. Pet. App. 53a. The United States argued that because Section 1503 of the EWSAA and Presidential Determination 2003-23 had made 28 U.S.C. 1605(a)(7) inapplicable to Iraq, the court had been divested of subject-matter jurisdiction prior to its entry of the default judgment. The district court denied the government's motion to intervene as untimely. Pet. App. 54a-57a. Considering its jurisdiction sua sponte, the district court held that Section 1503 and the Presidential Determination did not divest the court of jurisdiction that was proper when the suit began. *Id.* at 59a-61a.

5. The United States appealed the district court's denial of its motion to intervene, and argued that Section 1503 and the Presidential Determination had eliminated the district court's subject-matter jurisdiction before judgment was entered.

a. While the United States' appeal was pending, the court of appeals issued its decision in *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), holding that "neither section 1605(a)(7) nor the Flatow Amendment, separately or together, establishes a cause of action against foreign state sponsors of terrorism." *Id.* at 1027. Prior to oral argument in the present case, the court of appeals issued an

order directing the parties to be prepared to address the question whether the case should be remanded or dismissed in light of *Cicippio-Puleo*'s holding.

b. On June 4, 2004, the court of appeals issued a decision vacating the district court's default judgment in petitioners' favor and dismissing the suit. Pet. App. 39a. The court of appeals first held that the district court abused its discretion in denying the United States' motion to intervene. The court noted that the United States' sole purpose was to raise "a highly tenable challenge" to the district court's subject-matter jurisdiction, and that there were weighty foreign policy interests at stake and no prejudice to petitioners. *Id.* at 18a-19a.

Next, the court of appeals held that Section 1503 of the EWSAA does not apply to Section 1605(a)(7). Pet. App. 20a. Although finding it "an exceedingly close question," the court concluded that the power conferred on the President by Section 1503 did not encompass all statutes that come within its terms, including Section 1605(a)(7), *id.* at 22a, but was implicitly limited to "legal restrictions on assistance and funding for the new Iraqi Government," *id.* at 34a. The court held, therefore, that the President had exceeded his authority under Section 1503 and acted *ultra vires* when he purported to render Section 1605(a)(7) inapplicable to Iraq. *Ibid.*

Finally, the court of appeals turned to the issue it had posed in the pre-argument order, whether the case should be remanded or dismissed for failure to state a cause of action. The court noted that petitioners' complaint asserted a cause of action under Section 1605(a)(7) as "amended" by the Flatow Act. Pet. App. 36a. But *Cicippio-Puleo* definitively held that neither Section 1605(a)(7), nor the Flatow Act, nor the two together, create a cause of action against foreign states. *Id.* at 37a. The court of appeals observed that, while petitioners also "alluded to the 'traditional torts of assault,

battery and intentional infliction of emotional distress' in their generic form," they "did not point to any other specific source in state, federal, or foreign law for their cause of action." *Id.* at 36a (citation omitted). The court observed that, although petitioners "gestured again toward generic common law torts" at oral argument, "generic common law cannot be the *source* of a federal cause of action." *Id.* at 38a. The court explained: "The shared common law of the states may afford useful guidance as to the rules of decision in a FSIA case where a cause of action arises from some specific and concrete form of law. * * * But there is no support for the proposition that generic common law itself may furnish the cause of action. Rather, as in any case, a plaintiff proceeding under the FSIA must identify a particular cause of action arising out of a specific source of law." *Ibid.*

Because the court of appeals' *Cicippio-Puleo* decision and its pre-argument order put petitioners on notice of the issue, Pet. App. 39a, and because, "[w]hen pressed repeatedly at oral argument, [petitioners] offered no coherent alternative [basis for liability]," *id.* at 38a, the court ordered dismissal of petitioners' suit for failure to state a cause of action, *id.* at 39a.

c. Judge Roberts concurred in the dismissal of petitioners' suit, but did so on the jurisdictional grounds advanced by the United States. Pet. App. 40a. He observed that Section 1605(a)(7) is "on its face a 'provision of law that applies to countries that have supported terrorism,'" and rejected the majority's inference of additional limitations to circumscribe the President's authority. *Ibid.* Judge Roberts also noted that Congress had, at nearly the same time, enacted another statute which did expressly cabin the President's authority by using "more limited language along the lines of the majority's construction," *id.* at 41a, and that petitioners bore the burden to "demonstrate that Congress intended

something less than what [Section 1503] on its face says," *id* at 44a.

ARGUMENT

Petitioners challenge the court of appeals' holding that neither the Flatow Act nor generic common law provides a basis for imposing liability on foreign states. That holding is correct and does not conflict with any decision of this Court or of another court of appeals. Further review by this Court is therefore not warranted.

This case would not, in any event, be a suitable vehicle for considering petitioners' substantive arguments because, contrary to the conclusion of the court of appeals majority, the courts were deprived of jurisdiction over petitioners' claims when, prior to entry of judgment and pursuant to authority conferred on him by Section 1503 of the EWSAA, the President rendered 28 U.S.C. 1605(a)(7) inapplicable to Iraq.

1. The Court could not reach the substantive issues raised by petitioners in this case without first deciding whether the May 7, 2003 Presidential Determination immediately divested the courts of subject-matter jurisdiction over petitioners' claims, prior to entry of judgment, and therefore required dismissal of petitioners' complaint on that antecedent ground. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). A party who prevailed below may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (citation omitted). That is especially so with respect to questions of subject-matter jurisdiction. *Steel Co.*, 523 U.S. at 94-95.

Here, the United States urged in both the district court and court of appeals that, pursuant to EWSAA Section 1503,

the President rendered Section 1605(a)(7) inapplicable to Iraq on May 7, 2003, and thereby immediately divested the district court of jurisdiction to hear petitioners' suit. If the Court were to agree with the United States on this jurisdictional issue, the Court would not be able to reach the substantive issues on which petitioners seek review. *Steel Co.*, 523 U.S. at 110.

a. Congress authorized the President in EWSAA Section 1503 to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or *any* other provision of law that applies to countries that have supported terrorism." 117 Stat. 579 (emphasis added). The President fully exercised that power in Presidential Determination No. 2003-23, in which he decided to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act * * * and any other provision of law that applies to countries that have supported terrorism." 68 Fed. Reg. at 26,459. Those provisions plainly encompass 28 U.S.C. 1605(a)(7), the sole alleged basis for subject-matter jurisdiction in this case. By its terms, Section 1605(a)(7) abrogates foreign sovereign immunity for certain claims against a country "designated as a state sponsor of terrorism" under Section 6(j) of the Export Administration Act or under Section 620A of the Foreign Assistance Act. 28 U.S.C. 1605(a)(7)(A). The court of appeals erred in failing to give full effect to the plain text of Section 1503. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there").

To the extent there is any doubt whether Section 1503 encompasses 28 U.S.C. 1605(a)(7), the President has made clear his judgment that it does. In his formal report to Congress, the President explicitly stated his conclusion that both Section 1503 and the Presidential Determination encompass

"28 U.S.C. § 1605(a)(7)." See 39 Weekly Comp. Pres. Doc. 21, *supra*, at 647-648. Indeed, the President specifically referred to only three provisions as among the "other provisions of law" rendered inapplicable by his determination: Section 1605(a)(7); the FSIA's attachment provision, 28 U.S.C. 1610; and Section 201 of TRIA, 116 Stat. 2337, which creates special rules for the execution of a judgment issued under Section 1605(a)(7) against a terrorist state's frozen assets. 39 Weekly Comp. Pres. Doc. 21, *supra*, at 647-648. Because Congress entrusted the implementation of Section 1503 to the President, and because the President has independent constitutional authority in the area of foreign affairs, the court of appeals majority was wrong not to accord any deference to his construction of that provision, especially in light of the majority's recognition that 28 U.S.C. 1605(a)(7) falls within the literal terms of EWSAA Section 1503, Pet. App. 22a, and its conclusion that the interpretation of Section 1503 presented "an exceedingly close question," *id.* at 20a. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981) (Presidential action in foreign affairs context, authorized by Congress, "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation") (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

The conclusion by the majority below that Section 1503 should be confined to a narrower set of "provisions that present obstacles to assistance and funding for the new Iraqi Government," Pet. App. 20a, imposes an unwarranted limitation on the statute. Although the majority believed that the relevant criterion of similarity between Section 620A and the "other" provisions referred to in Section 1503 was that they impose "obstacles to assistance and funding," the text of Section 1503 expressly provides a different test of similarity —namely, whether the other provision of law is one that "ap-

plies to countries that have supported terrorism." And Section 1503 applies categorically to "*any*" such provision of law, language that plainly "demonstrates breadth." *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (citation omitted). Indeed, by its terms, Section 1503 reaches many sanctions that had applied to Iraq as a terrorist state, but which would be excluded by the majority's cramped construction because they do not relate to "assistance" or "funding," including the prohibition on exports (50 U.S.C. App. 2405(j)) and military contracts (10 U.S.C. 2327(b)), and the denial of visas to Iraqi nationals (8 U.S.C. 1735) (Supp. II 2002).

In any event, Section 1605(a)(7) *is* a statute that, to use the words of the majority below, "present[s] obstacles to * * * funding for the new Iraqi Government." Pet. App. 20a. As his Message to Congress explained, the President concluded that the "threat of attachment or other judicial process" against Iraqi assets necessary to stabilize and rebuild Iraq posed an "unusual and extraordinary threat * * * to the national security and foreign policy of the United States." 39 Weekly Comp. Pres. Doc. 21, *supra*, at 647. It was for this reason that the President singled out Sections 1605(a)(7) and 1610 of the FSIA and Section 201 of the TRIA, all of which pertain to the entry and execution of judgments against terrorist states, as among those rendered inapplicable to Iraq by the Presidential Determination. Thus, even under the majority's implied limitation on the scope of Section 1503, it erred in refusing to defer to the President's determination that the prospect of billion dollar judgments would seriously undermine funding for the essential tasks of the new Iraqi Government.

b. The majority stated that, because it found as a matter of statutory construction that Section 1503 did not permit the President to make 28 U.S.C. 1605(a)(7) inapplicable to Iraq, it need not consider whether Section 1503 would operate "ret-

roactively" as to this lawsuit. Pet. App. 31a. There is, however, no serious question of retroactivity here. Just days after the panel's decision, this Court held in *Republic of Austria* v. *Altmann*, 124 S. Ct. 2240 (2004), that application of changes in the United States' policy respecting foreign sovereign immunity to causes of action that arose before the policy change do not implicate retroactivity concerns. The Court reasoned that, rather than establishing rights, the doctrine of foreign state immunity "reflects current political realities and relationships," and in light of the courts' history of "deferring to the 'decisions of the political branches . . . on whether to take jurisdiction,'" it is "more appropriate, absent contraindications, to defer to the most recent such decision * * * than to presume that decision *inapplicable* merely because it postdates the conduct in question." *Id.* at 2252 (quoting *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

Section 1503 and the Presidential Determination reflect a most profound shift in the political Branches' foreign policy toward Iraq—from viewing it as an enemy to a state subject to our protection. The success of Iraq is critical to United States foreign policy. It is this most recent policy, manifested in EWSAA Section 1503 and the President's determination to render 28 U.S.C. 1605(a)(7) inapplicable to Iraq, to which the courts should defer. Whereas subjecting Iraq to suit under Section 1605(a)(7) served the United States' foreign policy interests by threatening large damage awards for the wrongs of the Hussein regime, in the immediate aftermath of the removal of that regime by military force, such judgments would hinder crucial foreign policy objectives. Thus, in accordance with *Altmann*, and a long line of cases holding that statutes ousting the courts' jurisdiction are to be given immediate effect in pending cases, *e.g.*, *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952); *Hallowell* v.

Commons, 239 U.S. 506, 508 (1916); *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 108, 110 (1801), application of EWSAA Section 1503 to this pending litigation does not raise retroactivity concerns.

Moreover, as Judge Roberts noted in his concurring opinion (Pet. App. 49a-50a), the Presidential Determination making Section 1605(a)(7) inapplicable to Iraq, including in this suit, does not upset any settled expectations of petitioners. At the time of petitioners' injuries, which was prior to enactment of Section 1605(a)(7), Iraq was immune from suit in U.S. courts on claims such as petitioners'. Section 1503 and the Presidential Determination simply restored that immunity and returned petitioners' claims to the realm of international diplomacy. Nor does the Presidential Determination mean that petitioners will be entirely uncompensated. After the new Iraqi regime has had time to become firmly established, the President may choose to espouse petitioners' claims through diplomatic means. Cf. *Dames & Moore*, 453 U.S. at 686. United Nations Security Council Resolution 1483, U.N. Doc. S/Res/1483 (2003), however, imposes a moratorium on claims against frozen Iraqi assets and proceeds of Iraqi oil sales until December 31, 2007, in order to allow "an internationally recognized, representative government of Iraq" to be established. In the meantime, certain international efforts have already been undertaken to provide some measure of compensation to the multitude of Iraq's victims from the First Gulf War.[4]

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[4] The Security Council established the United Nations Compensation Commission (UNCC) to address 2.6 million claims from nearly one hundred countries, seeking approximately $353 billion in damages from Iraq stemming from the First Gulf War. See http://www2.unog.ch/uncc/start.htm. The compensation fund, derived from the proceeds of Iraqi oil sales, has made awards of approximately $52 billion, of which $20 billion have been paid. See http://www2.unog.ch/uncc/status.htm. Among those eligible to apply for

c. The court of appeals majority also relied on its understanding that, pursuant to Section 1503's sunset provision, the Presidential Determination would cease to have effect and Section 1605(a)(7) "would once again be available as a basis of jurisdiction" against Iraq after September 30, 2004. Pet. App. 32a. That view reflects a misconception about the temporal effect of the President's authority to "make inapplicable" provisions such as Section 1605(a)(7). The phrase "make inapplicable" connotes a permanent effect. Similarly, Section 1503's sunset provision provides that the President's "authorities" under the provision would expire; it does not provide that the President's *exercise* of those authorities, if done within the two-year period, would cease to have legal effect after that date.[5]

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compensation from the UNCC were service members of coalition forces who were captured during the war and suffered injuries as a result of violations by Iraq of the Geneva Convention. State Department records indicate that 15 of the 17 service member petitioners in this case applied for and received some compensation through the UNCC. The service member petitioners were also authorized to receive per diem compensation from the Department of Defense, beyond their usual compensation, at twice the normal rate provided by regulation for prisoners of war. See *Gulf POWs to be paid full per diem*, Air Force Times, Sept. 16, 1991, at 4. See also 7A Department of Defense, *Financial Management Regulation* ch. 37 (1999) (except as authorized by the Secretary of Defense, members in captive status are entitled to "50 percent of the world-wide average per-diem rate").

[5] Further, as Judge Roberts observed in his concurring opinion, even if the majority's view of the effect of the sunset provision were correct, the various provisions of law made inapplicable to Iraq by Presidential Determination No. 2003-23 would only come back into force if Congress did nothing in the meantime. Pet. App. 43a. In light of the dramatic change in this Country's relations with Iraq, Judge Roberts noted that "the occurrence of 'intervening events' [such as further Congressional action] is far more likely than their absence." *Ibid.* Indeed, Congress has acted to extend the President's authorities under EWSAA Section 1503 to September 30, 2005. See Emergency Supplemental Appropriations Act for Defense and for the Recon-

d. For the foregoing reasons, dismissal of petitioners' claims in this case was required by the President's determination to make 28 U.S.C. 1605(a)(7)—the only basis for petitioners' suit—inapplicable to Iraq. The issues petitioners raise about other aspects of the court of appeals' decision therefore are of no moment, and in any event they are, as explained below, without merit.

2. Petitioners claim three errors in the court of appeals' analysis of the causes of action available to them. First, petitioners contend that the court of appeals improperly required them to identify a federal cause of action and thereby "ignor[ed] the clear availability of state law causes of action" under the FSIA. Pet. 23; see Pet. 8-12. Second, petitioners contend that the court of appeals erred in concluding that the Flatow Act does not create a federal cause of action against foreign states. Pet. 19-22. And, third, petitioners contend that the court of appeals erred in failing to examine "the availability of causes of action under federal common law for violations of universally accepted international legal norms." Pet. 23; see Pet. 12-19. None of these contentions has merit.[6]

a. When a statutory exception to foreign sovereign immunity exists, the FSIA makes foreign states liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. Petitioners repeatedly assert that the court of appeals erred by "ignoring" or

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struction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 2204(2), 117 Stat. 1230.

[6] Although the United States did not intervene for the purpose of raising substantive objections to petitioners' default judgment, the United States has participated as amicus curiae in several cases before the court of appeals to address the same issues—indeed, the court of appeals directed the United States to submit its views in the *Cicippio-Puleo* case—and the substantive analysis of the court of appeals is consistent with the views the United States has articulated.

"strip[ping] out the state [tort] law" causes of action that can provide a basis for liability against a foreign state subject to suit under Section 1605(a)(7). See, *e.g.*, Pet. 2, 8, 11, 23. Petitioners mischaracterize the court of appeals' decision.

The court of appeals did not reject the possibility that state or foreign law could provide a basis for a foreign state's liability in a suit under Section 1605(a)(7). To the contrary, it specifically noted that state or foreign law might be an appropriate source of law. See Pet. App. 36a (noting petitioners' failure to "point to any * * * specific source in state, federal, or foreign law for their [common law] cause of action"). Thus, the court's repeated admonition that a plaintiff in a suit under the FSIA "must identify a particular cause of action arising out of a specific source of law," *id.* at 38a, plainly contemplates that "state * * * or foreign law" could provide the basis for a foreign state's liability in a suit under Section 1605(a)(7). Indeed, in *Cicippio-Puleo*, to which the panel referred, the court of appeals specifically recognized the possibility that state or foreign law could provide the basis for liability in a Section 1605(a)(7) suit. See 353 F.3d at 1036 (remanding case to give plaintiffs an opportunity to assert "a cause of action under some other source of law, *including state law*") (emphasis added). And, as petitioners concede (Pet. 10 n.1), the court of appeals has continued to acknowledge the possibility that state law might provide a source of liability in cases decided after this one. See *Kilburn* v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129, 1134 (D.C. Cir. 2004) (noting that plaintiff had alleged "a number of sources that could provide a cause of action, including state, federal, foreign, and international law," though declining to decide, on interlocutory appeal, "[w]hether state tort law properly provides the plaintiff with a cause of action" in that case); *Price* v. *Socialist People's*

Libyan Arab Jamahiriya, 389 F.3d 192, 200 (D.C. Cir. 2004) (same).

The court of appeals held, however, that a foreign state's liability under the FSIA must arise from a "specific and concrete source of law" of a "specific" sovereign, Pet. App. 36a, 38a, not general common law. That holding is both correct and unexceptional. This Court rejected the concept of "generic common law" as a "brooding omnipresence" in *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). See *Salve Regina College* v. *Russell*, 499 U.S. 225, 226 (1991) (quoting *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)); *Erie*, 304 U.S. at 79. The "common law," the Court explained is not "a transcendental body of law outside of any particular State," but exists only to the extent there is "some definite authority behind it." *Ibid.* (citation omitted). Thus, the court of appeals was correct to insist that "generic common law" cannot serve as the source of a foreign state's liability, but, rather, the plaintiff "must identify a particular cause of action arising out of a specific source of law." Pet. App. 38a. The only decisions cited by petitioners that apply "general principles of liability, such as those set forth in the *Restatements*," to the question of a foreign state's substantive liability in a suit under the FSIA are pre-*Cicippio-Puleo* default-judgment decisions from the District Court for the District of Columbia in which there was no defendant to point out this error. Pet. 15 n.2 (citing *Jenco* v. *Islamic Republic of Iran*, 154 F. Supp. 2d 27, 47-50 (D.D.C. 2001), aff'd *sub nom. Bettis* v. *Islamic Republic of Iran*, 315 F.3d 325 (D.C. Cir. 2003); *Anderson* v. *Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000)).[7]

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[7] In *Bettis*, the D.C. Circuit referred to the Restatement's description of the common law tort of intentional infliction of emotional distress, but did so in the context of assuming *arguendo* that the plaintiffs had a federal cause of action under the Flatow Act and that the Restatement was a proper description of the

Nor is there anything inconsistent between the court of appeals' opinion and this Court's decision in *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983). The Court there recognized that "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *Id.* at 622 n.11. The Court was plainly referring to the law of a *particular* state.[8]

b. Petitioners also argue that the court of appeals erred in rejecting their claim against Iraq under the Flatow Act. Pet. 19. By its terms, however, the Flatow Act does not create a cause of action against a foreign sovereign. Rather, the Flatow Act provides only that an "official, employee, or agent of a foreign state * * * shall be liable" for conduct described in Section 1605(a)(7). 28 U.S.C. 1605 note. Because the statutory language is unambiguous, no further inquiry is necessary. *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 516 (1997).

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scope of this federal cause of action. The court ultimately held that, even so assuming, the plaintiffs could not satisfy the Restatement's standard, which was equally or more permissive than any state court decisions. 315 F.3d at 335-336. *Bettis* therefore is not authority for the proposition that generic common law is a source of liability under the FSIA.

[8] Petitioners argue that, by requiring them to identify a specific state law cause of action, the court of appeals "appears to have confused the question of whether petitioners have valid *causes of action* with the question of which *substantive rules of liability* federal courts should apply in FSIA cases." Pet. 15 n.2. The semantic question whether it is more accurate to refer to Section 1606 of the FSIA as creating a federal cause of action that adopts state or foreign substantive rules of liability, or as permitting liability to be asserted against foreign sovereigns based on state or foreign causes of action, is of no practical consequence here. In either case, the plaintiff must identify the "particular cause of action arising out of a specific source of law," Pet. App. 38a, that would be the basis of liability for "a private individual under like circumstances," 28 U.S.C. 1606.

Additional considerations, however, provide further support for the court of appeals' conclusion that the Flatow Act does not create a cause of action that can be asserted against foreign sovereigns through Section 1606 of the FSIA. Section 1606 provides that, with respect to claims as to which foreign states are not immune, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. The Flatow Act does not create a general cause of action applicable to a "private individual." Like the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, *reprinted in* 28 U.S.C. 1350 note, the Flatow Act provides a cause of action only against a foreign state's *officials*. See 28 U.S.C. 1605 note (Flatow Act provides cause of action against "an official, employee, or agent of a foreign state"); 28 U.S.C. 1350 note (TVPA provides cause of action against "[a]n individual [acting] under actual or apparent authority, or color of law, of any foreign nation"). That the defendant is a foreign governmental "official" or person acting under "actual or apparent authority * * * of a[] foreign nation" is a substantive element of claims under those statutes that excludes both "private individuals" and foreign states from their reach. See H.R. Rep. No. 367, 102d Cong., 1st Sess. 5 (1991) (TVPA "does not attempt to deal with torture or killing by purely private groups"); *id.* at 4 ("only 'individuals,' not foreign states, can be sued under the bill"); accord S. Rep. No. 249, 102d Cong., 1st Sess. 7, 8 (1991).

Moreover, contrasts between Section 1605(a)(7) and the Flatow Act indicate that the omission of foreign states from the Flatow Act's reach was not inadvertent. Section 1605(a)(7), which was enacted in April 1996, abrogates the sovereign immunity of "[a] foreign state" for specified acts engaged in by its officials, employees, or agents. 28 U.S.C. 1605(a) and (a)(7). The Flatow Act, adopted five months

later, specifies that the cause of action it creates runs against an "official, employee, or agent of a foreign state." 28 U.S.C. 1605 note. In light of the obvious relation between the two provisions, the fact that Congress declined in the Flatow Act to "list 'foreign states' among the parties against whom * * * an action may be brought," *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 87 (D.C. Cir. 2002), cannot be deemed accidental.

Petitioners urge the Court to circumvent the textual limitations of the Flatow Act by invoking the doctrine of "*respondeat superior*" to apply the Act against foreign states directly. Pet. 20-21. But the court of appeals quite properly rejected that contention. Petitioners' suggestion that courts should imply a private cause of action directly against foreign states under the Flatow Act flies in the face of this Court's admonition against inferring private rights of action not specifically authorized by Congress. See, *e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-284 (2002); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 & n.3 (2001); *Alexander* v. *Sandoval*, 532 U.S. 275, 287-288 (2001). That caution is especially appropriate where Congress has provided a private cause of action (against foreign government officials), but that cause of action is by its terms inapplicable. See, *e.g.*, *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 209 (2002) (courts should be "reluctant" to "exten[d] remedies not specifically authorized" in express enforcement provisions) (citation omitted).

Those concerns are even more heightened here, in the context of suits against foreign states. See *Dayton* v. *Czechoslovak Socialist Republic*, 834 F.2d 203, 205 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (recognizing that the "amenability of a foreign nation" to suit in the United States is "a sensitive matter"). Congress acted carefully in adopting the Flatow Act and TVPA, taking certain steps to assist victims of state-

sponsored terrorism while not taking others. While Congress took the "significant step" of "authoriz[ing] a cause of action against officials, employees, and agents of a foreign state," it "has yet to take" the "even greater step" of "[r]ecognizing a federal cause of action against foreign states" themselves. *Cicippio-Puleo*, 353 F.3d at 1036.[9] As the court of appeals held in *Cicippio-Puleo*, "it is for Congress, not the courts," to take the additional step of extending those causes of action to foreign states. *Id.* at 1036.

c. Petitioners argue that the court of appeals erred by failing to consider whether they have a cause of action under federal common law or the law of nations for Iraq's violation of international norms against torture. Pet. 12-19. As the petition makes clear, however, petitioners never presented such a claim to the lower courts. See Pet. 4 (listing causes of action advanced by petitioners below); Pet. App. 179a-194a (reproducing petitioners' arguments before the district court respecting bases of liability). Thus, whether such a cause of action exists as a matter of federal common law is not fit for this Court's review. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below.").

It is clear, in any event, that petitioners' contention is meritless. Petitioners ground their argument in this Court's recent decision in *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739 (2004). In *Sosa*, the Court held that while 28 U.S.C. 1350 "creat[es] no new causes of action," it reflected Congress's "understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time," and that "the district courts would recognize" these causes of

[9] Congress acted in a similarly circumspect fashion when it created a general civil cause of action against foreign terrorists, 18 U.S.C. 2333(a), but specifically excluded foreign states and their officers, 18 U.S.C. 2337(2).

action. *Sosa*, 124 S. Ct. at 2761. But the reasoning of the *Sosa* decision relied on unique features of Section 1350 that are not present here.

Both the language and historical context of Section 1605(a)(7) distinguish it from 28 U.S.C. 1350. The latter makes specific reference to a "tort * * * committed in violation of the law of nations," 28 U.S.C. 1350, whereas Section 1605(a)(7) makes no reference to claims based on international law norms. Moreover, the Court made clear that its holding in *Sosa* rested on the "ambient law of the era" in which the predecessor of the current 28 U.S.C. 1350 was enacted, 124 S. Ct. at 2755, in particular, the then-prevailing "conception * * * of the common law as 'a transcendental body of law outside of any particular State,'" *id.* at 2762. But, as noted above, see p. 19, *supra*, and as the Court recognized in *Sosa*, *ibid.*, that understanding of the law was rejected in *Erie*. The Court concluded in *Sosa* that the change of view regarding the common law did not deprive courts of the authority that Section 1350 was originally understood to confer. *Id.* at 2765. That rationale has no application to the FSIA in general or Section 1605(a)(7) in particular, which were enacted long after *Erie* became the settled law of the land. The *Sosa* opinion itself acknowledges that its reasoning was limited to 28 U.S.C. 1350 and did not extend to other jurisdictional statutes that do not share those particular features. 124 S. Ct. at 2765 n.19 (observing that courts would not have authority to develop common law causes of action for international law violations pursuant to 28 U.S.C. 1331). Indeed, in the same month that *Sosa* was decided, the Court recognized that "the FSIA simply limits the jurisdiction of federal and state courts to entertain claims against foreign sovereigns. The Act does not create or modify any causes of action." *Altmann*, 124 S. Ct. at 2251 n.15.

Even if petitioners had raised and the court of appeals had decided the viability of a claim based on international law in light of *Sosa*, and even if petitioners' argument had merit, certiorari would still not be warranted to review that issue, because other courts of appeals have not yet had an opportunity to explore the interplay between the *Sosa* decision and the FSIA. Petitioners contend that the issue cannot percolate further, nor will a circuit conflict develop, because the District of Columbia is, in effect, the sole forum for claims asserted under Section 1605(a)(7). Pet. 23-25. The petition's acknowledgement of cases brought under Section 1605(a)(7) within the Second and Eleventh Circuits, Pet. 24 n.10, disproves that assertion, and there are other examples as well. *E.g.*, *Smith* v. *Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003). Moreover, the question whether claims for violation of the laws of nations can be asserted against foreign states in suits brought under the FSIA is not limited to actions asserting jurisdiction under Section 1605(a)(7), but can arise in suits asserting jurisdiction under other exceptions, such as commercial activity, 28 U.S.C. 1605(a)(2), property taken in violation of international law, 28 U.S.C. 1605(a)(3), or domestic torts, 28 U.S.C. 1605(a)(5). See, *e.g.*, *Altmann*, 124 S. Ct. at 2245 (noting that plaintiff asserted a cause of action for violation of international law in a suit brought under the FSIA's takings exception); *Joo* v. *Japan*, 332 F.3d 679 (D.C. Cir. 2003) (noting claim for sexual enslavement and torture in suit brought under the FSIA commercial activity exception), vacated and remanded, 124 S. Ct. 2835 (2004); *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005) (discussing claims of international terrorism arising out of September 11 attacks in action filed under the FSIA domestic tort exception). Thus, contrary to petitioners' assertions, the D.C. Circuit is not the only court of appeals that could speak to the availabil-

ity of international law claims in suits brought under the FSIA.

3. Finally, petitioners contend that the court of appeals abused its discretion in dismissing their suit for failure to state a cause of action, and they ask this Court to exercise its supervisory power to remedy that alleged abuse. Pet. 25. Petitioners' fact-bound and case-specific request does not merit this Court's review. See *Massachusetts* v. *Sheppard*, 468 U.S. 981, 988 n.5 (1984). This Court will review a decision of a court of appeals under its supervisory authority only when a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). The court of appeals' decision to order dismissal of petitioners' suit does not approach that standard.

Petitioners' principal contention is that failure to state a cause of action is a defense that a defendant may waive by failing to appear in district court and that the court of appeals therefor abused its discretion by reaching out to dismiss their claims on the basis of that "waived non-jurisdictional issue." Pet. 25-26. Petitioners' argument simply ignores Section 1608(e) of the FSIA, which prohibits the entry of a default judgment against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. 1608(e). That provision reflects Congress's recognition of the sensitive nature of suits against foreign states and imposes on the court "an obligation to satisfy itself that plaintiffs have established a right to relief." *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 232 (D.C. Cir. 2003). In light of the statutory prohibition on assessing liability against a foreign state that is not warranted by the law, it was not an abuse of discretion for the court of appeals to take cognizance of its recent holding in *Cicippio-*

Puleo, which directly overruled the principal basis of the district court's judgment against Iraq.[10]

Nor does the court of appeals' refusal to grant petitioners a remand to permit them to identify a particular state or foreign law basis for Iraq's liability warrant exercise of this Court's supervisory authority. Through its pre-argument order referring to the *Cicippio-Puleo* decision, the court of appeals informed petitioners that it was concerned about the viability of their causes of action. Although petitioners maintain that they have viable state-law claims, in none of their filings in this case—including their petition to this Court—have petitioners identified any specific state or foreign law that could serve as the basis for Iraq's liability in this case. See, *e.g.*, Pet. 4, 7.

Nor did petitioners explain to the court of appeals at oral argument which specific state or foreign law establishes Iraq's liability. See Pet. App. 38a. Counsel for petitioners may have been unable to identify a specific source of law that established Iraq's liability. Or perhaps he made a tactical decision not to accept the premise of the court's questions at oral argument in hopes that it would simply affirm the nearly billion-dollar judgment petitioners had won from the district court, albeit on the basis of "generic" common law causes of action rather than the cause of action under the Flatow Act that the district court had found but that the D.C. Circuit's intervening decision in *Cicippio-Puleo* had rendered unavailable. In either event, case-specific issues concerning the court of appeals' disposition of the case would not warrant review by this Court. That is especially so given the thresh-

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[10] Nor, contrary to petitioners' assertions (Pet. 26), was it improper for the court of appeals to recognize the important foreign policy implications of the suit. That observation did not represent a "judicial foray into foreign policy," *ibid.*, but a simple acknowledgment of the importance of the litigation, a fact that the United States had stressed in its briefs.

old jurisdictional bar to this suit in light of the President's determination under EWSAA Section 1503 to render 28 U.S.C. 1605(a)(7) inapplicable to Iraq. That question of subject-matter jurisdiction would have to be considered by this Court before it addressed any other issues raised by petitioners, and the soundness of the President's determination establishes that dismissal of petitioners' suit is required in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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